Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Chad A. Wildman,

complainant,

and

National Automobile, Aerospace, Transportation and General Workers Union of Canada,

respondent,

and

Ceva Logistics Canada ULC,

employer.

Board File: 29709-C
Neutral Citation: 2014 CIRB 725
April 29, 2014

The Canada Industrial Relations Board (the Board) was composed of Mr. Patric F. Whyte, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members. A hearing was held on January 14 and 15, 2014.

Appearances

Mr. Chad Wildman, on his own behalf and assisted by Tanya Wildman;

Mr. Keith Osborne, on behalf of the respondent, The National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (known as Unifor);

Mr. Neal B. Sommer, counsel for the employer, CEVA Logistics Canada ULC.

These reasons for decision were written by Mr. Patric F. Whyte, Vice–Chairperson.

I. Nature of the Complaint

[1] Mr. Chad Wildman (the complainant) was employed by CEVA Logistics Canada ULC (the employer or CEVA) at the time of his termination and was covered by a collective agreement between CEVA and the National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW–Canada) (now known as Unifor) (CAW or the union).

[2] On November 19, 2012, the Board received a complaint from the complainant alleging that the union had breached the duty of fair representation (DFR) that it owed to him, and thereby violated section 37 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

[3] The complainant also filed a complaint under *Part II–Occupational Health and Safety* (*Part II*) of the *Code* alleging that CEVA had disciplined him and later terminated his employment because of safety concerns he had raised.

II. Earlier Decisions

[4] A panel of the Board differently constituted, determined in *Wildman*, 2013 CIRB LD 3007 (LD 3007), that parts of Mr. Wildman's complaints were untimely and stated:

> The Board has waded through Mr. Wildman's submission. It is satisfied that his complaints about events from the spring of 2012 are untimely. The Board accepts that his complaint about the circumstances surrounding his termination in October, 2012, is timely. The Board's conclusion applies to both the Part I and Part II complaints.
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> (page 5)

[5] However, the Board deferred hearing the timely portions of the complaints while a similar process was ongoing before the Ontario Labour Relations Board (the OLRB). Nonetheless, the Board provided the parties with guidance regarding the nature of the DFR process in the event the matter were to proceed.

[6] In *Wildman*, 2013 CIRB LD 3044 (LD 3044), following the end of the OLRB process, the Board set out how it would deal with the two complaints. The Board again reminded the parties

of the nature of the DFR process and the precise nature of the issue to be determined by the Board.

[7] In *Wildman*, 2013 CIRB LD 3129 (LD 3129), the present panel of the Board considered the complainant's *Part II* complaint and ultimately dismissed it.

[8] This decision, therefore, deals only with the remaining DFR complaint and specifically, the alleged failure of the union to meet its DFR as required by section 37 of the *Code* in its handling of the complainant's termination grievance.

III. Background and Facts

[9] The facts regarding the events that precipitated the termination of the complainant's employment are set out in LD 3129 and need not be repeated here.

[10] The following is a summary of the facts derived from the parties' written submissions and the evidence presented at the hearing, which are relevant to the determination of this matter.

[11] At the outset of the hearing, the complainant advised the Board that he could not afford to bring witnesses and that he would therefore be the only witness in his case.

[12] The complainant testified at the hearing that his concerns about his health and safety were the reason for why he refused to meet with the employer and the union on the night shift of October 11/12, 2012. He stated that nobody listened to his complaint about how he felt vulnerable and unsafe in his workplace. He further stated that he was kept completely in the dark about his grievance, that he was not included in the grievance process, and that he was not given an opportunity to submit documents to the union in order to explain his concerns about his health and safety and the role they played in the events that led up to his termination.

[13] At the hearing, the union called three witnesses, the first of whom was Mr. Keith Buckingham, the union representative. Mr. Buckingham testified that he filed a termination grievance on the complainant's behalf. He also stated that he had several meetings but that the termination would not be reversed. Mr. Buckingham was not asked to provide any details of when and with whom these meetings took place, nor did he offer any such information.

[14] On cross-examination, Mr. Buckingham admitted that he filed a termination grievance and then passed it to the union plant Chairperson. He further admitted that he had not collected any information from the complainant regarding his termination nor had he attempted to contact him by email, phone or letter. He expressed that the complainant would not talk to him. He also admitted that he was not aware of the complainant's requests for a health and safety representative in the events leading up to his termination.

[15] The union then called Mr. Bobby McBride, the alternate union representative, who testified that after the complainant was terminated he told him he would investigate the matter and that he called him on October 12, 2012, to reassure him that a grievance would be filed. He stated that he told the complainant that he would not be forgotten and advised him to file for employment insurance benefits. He further testified that he called the complainant in late October but did not reach him and that he then received a call from an unidentified woman who told him not to call that number again.

[16] On cross-examination, Mr. McBride admitted that he had not called the complainant again after the woman told him not to call the number, nor did he attempt to contact him by email or to send him a letter. Instead, Mr. McBride offered that "you had my number, you could call me." He also stated that there was nothing that required him to formally notify the complainant about his grievance. In response to a question about whether he was required to follow up, Mr. McBride stated that he always looks into facts but that he had been told by the unidentified woman not to contact the complainant. When questioned about whether it was he or Mr. Buckingham who had filed the grievance, Mr. McBride admitted that it was Mr. Buckingham who had filed it but that they were "both well aware of the facts of what happened." However, in follow-up questions, Mr. McBride admitted that he was not aware of the complainant's concerns regarding his health and safety or that he had asked for a health and safety representative on the night of his termination.

[17] Finally, the union called Ms. Wendy Gray, the union health and safety representative at the time, to testify. Most of Ms. Gray's testimony related to events or discussions in the days leading up to the complainant's termination that are not relevant to the issue in this case, even though they may be relevant to the merits of the complainant's grievance.

[18] On cross-examination, Ms. Gray testified that on the night of the complainant's termination, when Mr. Jim Anderson, the shift operations manager, and Mr. Buckingham were looking for the complainant in the warehouse after his refusal to meet with them. The complainant had told her that he did not want to be alone with either of them and that he did not feel safe with them.

IV. Positions of the Parties

A. The Complainant

[19] The Board has sifted though the complainant's submissions, both written and oral, and has distilled his position to the following.

[20] The complainant alleges that the union failed to perform an appropriate investigation into the facts surrounding his termination. He further alleges that the union has not provided him with any proof that it had filed a grievance on his behalf nor given him an opportunity to present his version of the events and/or circumstances that led to his termination, either with the union or in a grievance meeting with the union and the employer.

[21] The complainant states that the union has provided him with no evidence of its attempts to seek a lower penalty from the employer. The complainant alleges that the union did not seek or obtain a legal opinion before reaching its decision not to process his grievance further. The complainant also alleges that the union's failure to communicate with him in any regard to his case, all of which he alleges, constitutes bad faith.

[22] The complainant seeks as remedy:

- reinstatement to his original job on A dock;
- compensation for loss of earnings including overtime entitlement;
- compensation for injury and undue suffering;
- removal of the three-day suspension and termination from his personnel file;
- discipline and/or termination of Mr. Bate and Mr. Anderson;
- removal of Mr. Buckingham as union representative;
- order the employer and the union to implement and maintain policy and procedures; and
- an order that he may appoint counsel of his choosing to represent him at arbitration and that the union shall pay for such counsel.

B. The Union

[23] The union disputes the allegations of arbitrary conduct stating that a full investigation was undertaken by the in-plant union representatives, including Mr. Buckingham, Mr. McBride, Ms. Gray and Chairperson Kurt Hinchey. It takes the position that the grievance procedure was followed as outlined in the CAW/CEVA collective agreement.

[24] It is the union's position that its representatives did their due diligence in dealing with the situation and did not act in a discriminatory manner towards the complainant. It alleges that the complainant met with the local 222 President, Chris Buckley, the day following his discharge, to present his story. Mr. Buckley then followed up with the union plant Chairperson to ensure that the grievance was being moved through the grievance procedure.

[25] It is the union's position that the complainant had been disciplined on two separate occasions prior to the incident which gave rise to his termination and that his actions stemming from a third incident led to his being terminated. The union took the position that it talked with various committee members as to the chances of success for the grievance and determined that there was no chance of being successful and withdrew the grievance in January of 2013.

[26] The union submits that it did not act arbitrarily or in bad faith and has not violated section 37 of the *Code*.

[27] The union asks that the Board dismiss the complaint.

C. The Employer

[28] The employer took no position on the issues until the hearing, at which point counsel advised that the employer was not there as a respondent to the complaint but only to speak to the issue of remedy.

[29] The employer took the position that as the complainant had filed his complaint prior to the final disposition of his grievance, and did not raise the withdrawal of his grievance in his *viva voce* evidence, he was not entitled to a remedy regarding the ultimate disposition of the grievance by the union.

[30] The employer took the position that it should not be liable for any damages ordered at arbitration from the date of the withdrawal, January 10, 2013, to the commencement of the arbitration hearing and relies on the Board's decision in *Canada Post Corporation*, 2010 CIRB 558, as setting out the proper method for apportioning liability.

V. Analysis and Decision

[31] In LD 3044, the Board gave explicit direction to the union to explain in detail, with particulars including documentation, the process it followed when it concluded not to take the complainant's grievance to arbitration to contest his dismissal:

> The Board will similarly provide the CAW with an opportunity **to explain in detail the process it followed when it concluded not to take Mr. Wildman's grievance to arbitration**. The focus, for the submissions concern the events of October, 2012 and afterwards, given the Board's decision that any complaint about events from April and May, 2012 is untimely.
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> In *Wildman* 3007, the Board referred the parties to its decision in *Singh*, 2012 CIRB 639 which explained the scope of a DFR complaint and the Board's role. **The Board needs to know, with particulars including documentation, what process the CAW followed in order to arrive at its conclusion not to contest Mr. Wildman's dismissal.**

[32] As such, the Board does not agree with the employer that the issue of the withdrawal of the complainant's grievance was not properly before the Board. Rather, the main issue for the Board to determine here is whether the union acted in an arbitrary, discriminatory or bad faith manner in not taking the complainant's termination grievance to arbitration.

[33] The union did not provide any such particulars or documentation to the Board at the hearing. The Board has concluded that the union violated its duty for the following reasons.

[34] Section 37 of the *Code* states:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[35] The Board described the nature of the DFR in *Blakely*, 2003 CIRB 241, at paragraph 36:

> [36] Unions have considerable discretion in the conduct of their business. Section 37 of the *Code* does not give members of a bargaining unit an inherent right to have a grievance submitted to arbitration. That decision is the sole prerogative of the bargaining agent, **provided that it makes its decision in a manner that is not arbitrary, discriminatory, or in bad faith**. It is up to the Board, when

considering a complaint against the union, to determine whether the union turned its mind to the matter, considered it in a genuine fashion, and ultimately dealt with it in a manner consistent with the requirements of section 37.

(emphasis added)

[36] In a complaint such as this one, the Board is not looking at whether the union was correct in its decision to withdraw the complainant's grievance. The Board is instead looking at the conduct of the union in dealing with the grievance, including the process it followed in arriving at its decision to withdraw it.

[37] The Board has on many occasions set out what type of conduct would offend the DFR under section 37. In *Blakely*, *supra*, the Board described it as such:

[31] Arbitrary conduct has been described as arising where a union makes **no inquiry or only a perfunctory or cursory inquiry into an employee's grievance**, or where a union demonstrates a non-caring attitude towards an employee's interests. The term encompasses gross (as opposed to simple) negligence and includes a reckless disregard for a member's interest (see *William Campbell*, [1999] CIRB no. 8; *Joe Grasky et al.*, [2001] CIRB no. 115; and *Vergel Bugay et al.*, [1999] CIRB no. 45; 57 CLRBR (2d) 182; and 2000 CLLC 220-034).

[32] Discriminatory conduct occurs when a union distinguishes between employees on illegal, arbitrary, or unreasonable grounds (see *Vergel Bugay et al.*, *supra*). In *Frank Eibl et al.*, [2002] CIRB no. 200; and 89 CLRBR (2d) 119, the Board adopted the following definition of discrimination as provided by the Nova Scotia Labour Relations Board in *Daniel Joseph McCarthy*, [1978] 2 Can LRBR 105:

"In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the *Human Rights Act*, S.N.S 1969, c. 11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule of policy itself is one that bears no fair and rational relationship with the decision being made. The classic example is a rule excluding all applicants with red hair from some position.

(page 108)"

[33] Bad faith conduct has been described as arising in circumstances where a union acts fraudulently, for improper motives, or out of personal hostility or revenge. In *James H. Rousseau* (1995), 98 di 80; and 95 CLLC 220-064 (CLRB no. 1127), the Board stated:

"Bad faith' refers to a subjective state of mind or conduct which has been motivated by ill-will, hostility, dishonesty, malice, personal animosity, political revenge, lack of fairness or impartiality, lack of total honesty such as withholding information, flagrant dishonesty such as lying, or sinister purposes. ...

...

> The primary focus in a section 37 complaint is on the conduct of the union and of its officers and agents. ...
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> (pages 105–106; and 143,559)"
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> (emphasis added)

[38] In the present case, the complainant alleges that the union breached its duty on the basis of all three grounds of improper conduct set out above. The Board has looked at the allegations as a whole in analyzing whether the union's conduct violated its DFR.

[39] The Board will generally not find that the union's conduct violated its DFR if the union demonstrates that it investigated the complainant's grievance, obtained full details of the case—including the employee's side of the story–and advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration (see *McRaeJackson*, 2004 CIRB 290).

[40] However, in cases where the union's alleged misconduct is in relation to its handling of a termination grievance, the Board will hold the union to a higher degree of scrutiny. This enhanced scrutiny was described succinctly in *Cheema,*, 2008 CIRB 414, as follows:

> [20] The Board also wishes to point out that, as stated in *Virginia McRaeJackson, supra*, the union's duty of fair representation is open to greater scrutiny when the matter involves an employee's termination of employment:
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> "[31] The union's duty in this regard is open to greater scrutiny when a matter involves an employee's termination, serious discipline that affects gainful employment or a disability that requires accommodation. ..."
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> [21] In keeping with the "greater scrutiny" required in cases where a member's employment is terminated, the Board will normally find that the *prima facie* test has been met if the union does not provide the terminated employee with a explanation as to why the grievance was not pursued through the full grievance procedure and if there is reason to believe that the union's conduct could be attributed to arbitrary, discriminatory or bad faith motives.

[41] While the Board has consistently held that the complainant bears the burden of proof in a section 37 complaint, this does not mean that a union need not present evidence of how it handled a complainant's grievance.

[42] Recently, in *Scott*, 2014 CIRB 710, the Board commented on the distinction between the burden of proof and the evidential burden in a section 37 complaint:

> [97] In a DFR case, the complainant bears the burden of proof to demonstrate that the trade union violated the *Code*. The Board commented on this burden in *Griffiths*, 2002 CIRB 208:
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> "[37] The onus under a section 37 complaint rests with the complainant to present evidence that is sufficient to raise a presumption that the union has failed to meet its duty of fair representation unless rebutted. In order to satisfy that onus, it is imperative that the complainant show, to the satisfaction of the Board, that the union was aware of the situation giving rise to the complainant's concerns and that the union's subsequent actions taken on behalf of the complainant, in the absence of any evidence to the contrary, were in some way arbitrary, discriminatory or taken in bad faith. Moreover, as held by the Board's predecessor, the Canada Labour Relations Board (the CLRB), in *Craig Harder* (1984), 56 di 183; and 84 CLLC 16,043 (CLRB no. 472), there is not an obligation on the part of the union to seek out or solicit grievances from its members. The obligation to contest the employer's action rests squarely with the employee. It is, therefore, also the employee's obligation to ensure the union is aware of the circumstances."
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> [98] The burden of proof always remains on the complainant.
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> [99] This does not mean, however, that there is no evidentiary obligation on the respondent trade union. If the complainant has made out a *prima facie* case of a *Code* violation during its evidence, then the respondent trade union has an evidential burden to respond to that evidence and, in particular, establish the concrete steps it took to represent its bargaining unit member(s).

[43] These principles are equally applicable in this case. Despite the fact that the union did not introduce a copy of the grievance as evidence at the hearing, the Board accepts the evidence of Mr. Buckingham and Mr. McBride that a termination grievance was filed on the complainant's behalf. The complainant testified that after this grievance was filed, he was not given an opportunity to submit documents regarding his version of events, he was kept completely in the dark and he was not involved in the process relating to his termination grievance. He further testified that, had he been given an opportunity to participate in the process, which he saw as his right under the collective agreement, the outcome would have been different.

[44] The union was given an opportunity to cross-examine the complainant and did so. However, the union did not challenge the complainant's testimony about the lack of contact with the union regarding his termination grievance, nor did it challenge his evidence that he was kept completely in the dark about his grievance, that he was not given an opportunity to participate, or that the outcome would have been different if he had been involved.

[45] As mentioned above, the Board will give greater scrutiny to a union's conduct when the complaint is regarding the handling of a termination grievance and it has done so in this matter.

[46] Based on the foregoing, the Board is satisfied that the complainant has presented a *prima facie* case, which the union must rebut with evidence of the concrete steps it took to represent the complainant.

[47] As was stated in LD 3044, the Board expected to receive a detailed explanation from the union at the hearing regarding the process that it followed when it concluded not to take the complainant's termination grievance to arbitration. This information was solely within the knowledge of the union. However, the union did not provide this information to the Board.

[48] At the hearing, the union adopted its July 18, 2013 submissions as its opening statement, following which, the panel advised the union that the allegations made in the opening statement would need to be proven.

[49] While the opening statement referred to "a full investigation" having been conducted by Mr. Buckingham and Mr. McBride and that Ms. Gray and former Chairperson Kirk Hinchey were involved in the case, no evidence was led to support this assertion at the hearing.

[50] Mr. Buckingham testified that he had "several meetings," but no details were given about these alleged meetings.

[51] Mr. Buckingham admitted that the complainant would not talk to him at the time of his termination and that he had not at any time attempted to contact the complainant by phone, email or post.

[52] Mr. McBride admitted that he did not attempt to call, email or otherwise contact the complainant after being told by an unidentified woman to not call again at the end of October.

[53] The union did not call any other witnesses to testify regarding the union's investigation and decision-making process.

[54] The union also stated in its opening statement that the complainant had an opportunity to share his story of the termination when he met with the CAW Local 222, President Chris

Buckley, the day after his termination and that Mr. Buckley listened to the complainant's issues and followed up with Mr. Hinchey in order to ensure that the grievance was being moved through the grievance process set out in the collective agreement. However, for whatever reason, the union did not call Mr. Buckley or Mr. Hinchey to testify about these alleged conversations.

[55] Finally, in these submissions, the union states that it made its decision not to proceed with the complainant's grievance because it became "reasonable to assume we would not be successful in front of an arbitrator" because the "arbitrator would rely solely on the relevant facts and any previous discipline in making its decision." However, the union did not present any evidence at the hearing as to what steps it took to obtain these "relevant facts" or how they were weighed against the complainant's concerns surrounding the events precipitating his termination.

[56] Ms. Gray testified that the complainant had told her he feared for his safety and did not want to meet with Mr. Anderson and Mr. Buckingham alone. Both Mr. McBride and Mr. Buckingham testified that neither of them were aware of the complainant's concerns for his health and safety and the role that they played in his actions leading up to his termination.

[57] The Board recognizes that the complainant's refusal to talk to Mr. Buckingham might have made the union's representational efforts more difficult. However, had another representative of the union investigated the complainant's grievance or sought his side of the story, presumably it would have learned of the complainant's subjective belief that his physical and psychological safety were at risk were he to meet with Mr. Anderson and Mr. Buckingham. These would seem to be "relevant facts" that would have been useful in assessing the strength of the complainant's termination grievance.

[58] In the instant case, the Board has not heard of any concrete steps that the union took to represent the complainant and finds that by failing to conduct an adequate investigation, by failing to seek the complainant's position on his case, and by failing to advise him of the reasons for withdrawing the grievance, the union has acted arbitrarily in its representation of the complainant. The Board therefore finds that the union has violated its duty under section 37.

[59] The complainant has requested several remedies, most of which are beyond the Board's remedial powers.

[60] In this case, the breach is best remedied by ordering that the complainant's grievance proceed to arbitration and that any time limits in the collective agreement preventing it from proceeding are waived. Given the state of the relationship between the complainant and the union, the Board further orders that the complainant is entitled to retain legal counsel of his choice for the arbitration and that the union shall pay the reasonable costs of the complainant's chosen legal counsel as agreed between the parties or, if the parties are unable to agree, they can return to the Board for a determination.

[61] The employer argued that it should not be held responsible for any damages that an arbitrator might award for a violation of the collective agreement between January 10, 2013, the date of the withdrawal of the grievance, and the commencement of the arbitration hearing. The Board accepts this in part and orders that the employer shall not be responsible for any such damages awarded by an arbitrator between January 10, 2013 and the date on which this decision is issued. The union will be responsible for any damages awarded to the complainant for that time period.

[62] This apportionment recognizes that the employer should not incur an increased liability due to the union's breach of its duty of fair representation. However, as the employer would normally be wholly responsible for any compensation for a breach of the collective agreement awarded by an arbitrator in cases where no DFR complaint arose, the Board is not prepared to extend the union's liability beyond the date of this decision as requested by the employer.

[63] The Board remains seized of any issues arising from this decision, and in particular, its remedial orders.

[64] This is a unanimous decision of the Board and is signed on its behalf by

Patric F. Whyte
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member